

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 14, 2005 Session

**TAMMY D. NORRIS, ADMINISTRATRIX OF ESTATE OF DAVID P.
NORRIS, DECEASED, ET AL. v. JAMES MICHAEL STUART, ET AL.**

**Appeal from the Chancery Court for Wilson County
No. 01080 C. K. Smith, Chancellor**

No. M2004-01839-COA-R3-CV - Filed March 20, 2006

This appeal arises from the dissolution of a two-person general partnership. The partnership dissolved in 2000 upon the death of David Norris; however, instead of winding up the affairs of the partnership, the surviving partner, James Stuart, continued to operate the business without accounting to Norris' estate. Nine months after the death of Norris, his estate filed this action seeking an accounting of the partnership, liquidation of its assets, and settlement of accounts. The partnership assets included an on-going business and real estate. The trial court appointed a receiver to take control of the assets. After the receiver provided a report, the trial court ordered the receiver to wind up the affairs of the partnership and to sell its assets. The court also allocated partnership liabilities and assets between Stuart and the estate from which order Stuart appeals. We affirm the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN, and PATRICIA J. COTTRELL, JJ., joined.

Peggy D. Mathes, Nashville, Tennessee, for the appellant, James Michael Stuart, and Orchard Fence Company, G.P., a Partnership.

Lee M. Greer, Paris, Tennessee, for the appellees, Tammy D. Norris, Administratrix of the Estate of David P. Norris, deceased, and Tammy D. Norris, individually, and on behalf of Jacob P. Norris, a minor.

OPINION

David Norris and James Stuart formed a partnership known as the Orchard Fence Company in 1995. The primary business of the partnership was the sale and installation of fences and fence

materials. The partnership also owned real estate, including property identified as the Thirsty Turtle property and the Cliff Drive property.¹ Norris and Stuart shared equally in the profits.

David Norris died in a car wreck in June of 2000. Although his death brought about an automatic dissolution of the partnership, Stuart continued to operate the partnership business, the Orchard Fence Company, and continued to operate out of the partnership bank accounts without accounting to Norris' widow or the estate.

After the Norris estate filed this action in March of 2001, the trial court appointed a receiver to take possession and supervise the ongoing business activities of the Orchard Fence Company, the partnership's bank accounts, the Thirsty Turtle property, and a note and deed of trust pertaining to the Cliff Drive property that had been sold prior to Norris' death.²

The receiver filed his preliminary report in June of 2001. The report indicated that Stuart had continued to operate the Orchard Fence Company, a partnership asset, after Norris' death without recognizing the dissolution or accounting to the estate of the deceased partner. The receiver further reported that the partnership had acquired the Thirsty Turtle property in January of 2000 for \$457,000, and it remained an asset of the partnership. The receiver also reported that the partnership had sold the Cliff Drive property to Cecil Carter for which Carter remained indebted to the partnership pursuant to a promissory note.

Thereafter, the trial court ordered the receiver to sell the assets of the partnership, including without limitation the Thirsty Turtle property. As some of the assets were sold, the receiver used the proceeds to pay off some of the liabilities of the partnership. As ordered by the court, the Thirsty Turtle property was sold at auction on July 16, 2002, for \$355,000. Stuart was the successful bidder; however, the closing did not occur for more than a year after the auction.

In April of 2003, while the closing on the Thirsty Turtle property was pending and the allocation of partnership liabilities and assets remained to be determined, Stuart filed a motion seeking summary dismissal of all claims asserted by the estate. The estate filed a response contending summary judgment was not appropriate because the partnership had dissolved upon the death of Norris and regardless of which party prevailed there needed to be an accounting and winding up of the business of the partnership. The Chancellor agreed with the estate and denied all aspects of Stuart's motion on July 16, 2003.

¹Norris' estate contended the Thirsty Turtle property was a tenancy in common, but the trial court found it to be partnership property. Without a transcript of the evidence, we presume all findings by the trial court are correct.

²Stuart and Norris sold the Cliff Drive to a Cecil Carter taking a second mortgage position for the balance owing. Carter subsequently defaulted on the first mortgage, the property was sold at foreclosure in February 2001 leaving a deficiency owing to Stuart and Norris. A civil action was pending against Carter to recover the deficiency on the note, but Carter's whereabouts are unknown.

Thereafter, the receiver continued to wind up the affairs of the partnership under the supervision of the trial court. In the final order the trial court directed the receiver to pay out of partnership assets property taxes on the Thirsty Turtle property up to the date of the auction, and held Stuart responsible for the taxes from the date of the auction forward. Additionally, the trial court allocated the assets and liabilities of the partnership between the estate and Stuart, which resulted in a judgment against Stuart in the amount of \$54,497.98. The final order also directed the receiver to pay the judgment to the estate from the proceeds of the Thirsty Turtle sale, and after deducting costs and expenses remit the remaining proceeds to Stuart.

Stuart raises several issues on appeal. He contends the trial court erred by denying his motion for summary judgment, by appointing a receiver, and by valuing the assets of the partnership as of the date of dissolution, the day Norris died. He further argues the trial court erred in its allocation of assets and liabilities, and in requiring Stuart to pay the property taxes prior to closing. He also contends the trial court erroneously admitted hearsay evidence that was introduced through the estate's expert.

INCOMPLETE TRANSCRIPT OF THE EVIDENCE

It is the duty of the appellant to prepare a record which conveys a fair, accurate and complete account of what has transpired in the trial court with respect to the issues that form the basis of the appeal. *State v. Boling*, 840 S.W.2d 944, 951 (Tenn. Ct. Crim. App. 1992). Unfortunately, the record before us only contains a partial transcript of the evidence. The parties, counsel of record, and this court are deprived of a complete transcript of the evidence due to the errors and omissions of one of the court reporters who was responsible for preparing a portion of the transcript of the evidence. The record contains only one day of the transcript of the evidence, and the appellant has been unable to reconstruct the missing evidence. As a consequence, our record contains a portion but not all of the evidence considered by the trial court.

Mere statements of counsel, which are not appropriate proffers or not effectively taken as true by the parties, cannot establish what occurred in the trial court unless supported by evidence in the record. *State v. Thompson*, 832 S.W.2d 577, 579 (Tenn. Ct. Crim. App. 1991). To the extent that resolution of the issues on appeal depend on factual determinations, the lack of a transcript or statement of the evidence is essentially fatal to the party having the burden on appeal. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992); see Tenn. R. App. P. 24(b) and (c). In the absence of a complete record of the evidence considered by the trial court, we must treat the matter on appeal as one that is before this court on the technical record only.

STANDARD OF REVIEW

Without a transcript or statement of the evidence, we review this case on issues of law alone. Some of the issues presented hinge on the proper interpretation of Tennessee statutes and their application to facts that are not disputed. Issues involving the construction of statutes and their application to facts involve questions of law. *Memphis Publ'g Co. v. Cherokee Children & Family*

Servs., Inc., 87 S.W.3d 67, 74 (Tenn. 2002); *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999). Therefore, the trial court's resolution of these issues is not entitled to Tenn. R. App. P. 13(d)'s presumption of correctness on appeal. We will review the legal issues de novo and reach our own independent conclusions regarding them. *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002).

THE CONTROLLING PARTNERSHIP ACT

The partnership between Norris and Stuart was based upon an oral agreement entered into in 1995. The partnership formed by Norris and Stuart conducted business from that date until the death of Norris on June 3, 2000. The statutory scheme for partnerships in effect prior to the dissolution of the partnership was the Uniform Partnership Act. That Act, however, was repealed in 2001, after Norris' death, and has been superseded by the Revised Uniform Partnership Act³ (the "Revised Act") (See Acts 2001, ch. 353). The Revised Act became effective January 1, 2002 and governs all partnerships as of that date, Tenn. Code Ann. § 61-1-1206(c) (2001); nevertheless, it contains a savings clause that renders the Revised Act inapplicable to an action or proceeding commenced or a right accrued prior to January 1, 2002. Tenn. Code Ann. § 61-1-1207 (2001). Although most of the legal proceedings at issue occurred after January 1, 2002, the rights of the parties accrued, and this civil action was commenced prior to the effective date of the Revised Act. Accordingly, the Uniform Partnership Act in effect in 2000 and 2001 controls the issues on appeal.

DISSOLUTION, WINDING UP OF THE PARTNERSHIP AND APPOINTMENT OF A RECEIVER

The partnership between Stuart and Norris was based upon an oral agreement and there is no evidence in the record that the partnership had a limitation as to a particular undertaking or definite term. Thus, their partnership was a partnership at will. Pursuant to the statute in effect at the time of Norris' death, a partnership at will dissolved upon the death of a partner. Tenn. Code Ann. § 60-1-130(4) (2000) (repealed Jan. 1, 2002). Upon dissolution a partnership is not terminated but continues until the winding up of the affairs of the partnership is completed. Tenn. Code Ann. § 61-1-129 (2000) (repealed Jan. 1, 2002). The right to an accounting of a deceased partner's interest accrues to his legal representative as against the winding up partners in the absence of an agreement to the contrary, Tenn. Code Ann. § 61-1-142 (2000) (repealed Jan. 1, 2002), and the rules for settlement of the accounts between the partners after dissolution appear in Tenn. Code Ann. § 61-1-139 (2000) (repealed Jan. 1, 2002).

Litigants often fail to recognize the important distinction between the dissolution of a partnership and the winding up of partnership business. An excellent description of the distinction was provided in Tenn. Code Ann. § 61-1-128 (2000) (repealed Jan. 1, 2002). It explained the dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing

³The statutory scheme for partnerships in effect at the time of Norris' death in 2001 was repealed effective January 1, 2002 and replaced by the Revised Uniform Partnership Act, codified as Tenn. Code Ann. § 61-1-101 et seq., by Acts 2001, ch. 353. Pursuant to the 2001 Act, all partnerships were to be governed by the Revised Act after January 1, 2002. Tenn. Code Ann. § 61-1-1206(c).

to be associated in the carrying on of the business, such as the partner's death, as distinguished from the winding up of the business of the partnership following dissolution. Moreover, upon dissolution the partnership is not terminated; to the contrary it continues until the winding up of partnership affairs is completed. Tenn. Code Ann. § 61-1-129 (2000) (repealed Jan. 1, 2002).⁴

As an automatic consequence of the death of Norris, the partnership was dissolved on June 3, 2000. The dissolution triggered the next phase, the winding up of the business of the partnership. Because Stuart had not wrongfully dissociated from the partnership, he was entitled to wind up the business of the partnership pursuant to Tenn. Code Ann. § 61-1-136 (2000) (repealed Jan. 1, 2002); however, Stuart made no effort to wind up the business of the partnership. To the contrary, and without the consent of the legal representative of Norris, Stuart continued to operate the business of the partnership as though nothing had changed. Moreover, Stuart failed to provide an accounting of the partnership's activities. After a period of nine months, the estate became dissatisfied with the acts and omissions of Stuart and filed this action seeking the appointment of a receiver, an accounting and to wind up the business of the partnership in addition to recovering damages and obtaining general equitable relief. The Chancellor appointed a receiver to wind up the affairs of the partnership as requested by the estate. Stuart however contends the Chancellor erred by appointing a receiver.

We find no error with the Chancellor's decision to appoint a receiver, instead of Stuart, to wind up the business of the partnership and the settlement of its accounts. In winding up the business of a partnership, the assets of the partnership must be applied to discharge its obligations to creditors and each partner is entitled to a settlement of all partnership accounts upon winding up the business of the partnership. Tenn. Code Ann. § 61-1-137 (2000) (repealed Jan. 1, 2002). The record reveals that prior to the commencement of this action, Stuart had failed to properly account to the legal representative of his deceased partner and that he continued to operate the business instead of winding up the affairs. Stuart's actions during the nine months prior to the commencement of this action were sufficient for the estate and the Chancellor to question his loyalty to the partnership and its deceased partner. Whether to appoint a receiver, and the selection of the receiver, are matters within the sound discretion of the Chancellor. *Young v. Cooper*, 203 S.W.2d 376, 387 (Tenn. Ct. App. 1947). Considering the foregoing, we find no error with the Chancellor's decision to appoint a receiver to wind up the business of the partnership.

⁴The Revised Uniform Partnership Act, which was enacted in 2001 and took effect Jan. 1, 2002, provides for a similar protocol in the event of a dissolution. For example, a partnership continues after dissolution only for the purpose of winding up its business. Tenn. Code Ann. § 61-1-802(a) (2001). After dissolution, a partner who has not wrongfully dissociated may participate in winding up the partnership's business, but on application of any partner, or a partner's legal representative, a court of equity jurisdiction for good cause shown, may order judicial supervision of the winding up. Tenn. Code Ann. § 61-1-803(a) (2001). Moreover, a person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute or defend civil actions, settle and close the partnership's business, dispose of and transfer its property, discharge the liabilities of the partnership, distribute the assets, and perform other necessary acts. Tenn. Code Ann. § 61-1-802(c) (2001).

DENIAL OF STUART'S MOTION FOR SUMMARY JUDGMENT

Stuart contends the trial court erred by denying his motion for summary judgment. Stuart sought summary dismissal of essentially every cause of action asserted in the complaint including the prayer for an accounting, for dissolution of the partnership, the appointment of a receiver, the partition of the real estate, and the determination of the debt of the partnership.⁵

Although summary judgment is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001), we have concluded that Stuart was not entitled to summary dismissal as a matter of law because the estate was entitled to the relief it was seeking.

Furthermore, it is undisputed the partnership was a partnership at will, that Norris had died, and thus the partnership was automatically dissolved as a matter of law. Therefore, in the absence of an agreement to continue the partnership, Stuart was under an affirmative duty to wind up the affairs of the partnership. His only authority to act on behalf of the partnership after dissolution was to do what was necessary to wind up partnership affairs. Tenn. Code Ann. § 61-1-132 (2000) (repealed Jan. 1, 2002).

Instead of winding up the affairs of the partnership, however, Stuart continued to operate the business as though dissolution had not occurred. Moreover, he was obligated to but failed to account to the estate, to pay partnership liabilities and to settle the accounts between the partners. By statute, the rights of the deceased partner, Norris, accrued to the estate. Tenn. Code Ann. § 61-1-142 (2000) (repealed Jan. 1, 2002). As a consequence, the estate was entitled to an accounting, to wind up the business affairs, to the payment of the liabilities of the partnership, and to the settlement of the accounts between the partners. Tenn. Code Ann. § 61-1-120, 136, 137, and 139 (2000) (repealed Jan. 1, 2002). That is the relief the estate sought in the complaint. Therefore, Stuart was not entitled to summary dismissal. We therefore find no error with the denial of the motion for summary judgment.

⁵ Although we have concluded he was not entitled to the relief sought for other reasons, Stuart's motion for summary judgment also failed to set forth a sufficient legal or factual basis. He merely requested a dismissal of all claims by the estate without providing the court with a sufficient basis for the relief sought. The requirements of Tenn. R. Civ. P. 7.02(1), which apply to motions for summary judgment, oblige a party to inform the court of the relief they want and to give the court enough information to process the motion correctly. *Davis v. Tenn. Dep't of Employment Sec.*, 23 S.W.3d 304, 315 (Tenn. Ct. App. 1999); *see also Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710, 711 (Tenn. 2005). Merely seeking summary judgment upon the contention you are entitled as a matter of law is generally inadequate.

ASSESSMENT AND ALLOCATION OF ASSETS AND LIABILITIES

Stuart contends the Chancellor erred by ascertaining the value of the partnership as of the date of death. We have concluded the trial court followed the proper statutory procedure by assessing the assets and the liabilities of the partnership as of the date of dissolution of the partnership pursuant to Tenn. Code Ann. § 66-1-141 (2000) (repealed Jan. 1, 2002). Moreover, the trial court set out the manner by which it computed the amount owed to the estate and factored in liabilities owed by the partnership, assessing half of those against the estate. Stuart argues the trial court ordered him to pay all outstanding debt of the partnership, and although that language is in the order, it appears the trial court deducted the estate's share of the liabilities from the total amount owed to the estate. Furthermore, without a statement of the evidence in the record, there is no basis upon which we could conclude the trial court erred in his calculations or allocation of assets and liabilities.

ASSESSMENT OF PROPERTY TAXES

The trial court ordered the receiver to sell the Thirsty Turtle property at auction. Stuart was the successful bidder at the auction, however, the sale did not close for more than a year. The court's final order distributing the assets and liabilities between Norris' estate and Stuart, directed the receiver to pay out of partnership assets all property taxes on the property up to the date of the auction, and held Stuart responsible for the taxes from the date of the auction forward. Stuart contends this was error.

Stuart primarily relies on the terms of sale as stated in the advertisements, which provided the taxes would be pro-rated as of the date of the deed. However, we may not consider this fact alone. Without a transcript of the evidence, we are deprived of knowing what additional evidence the trial court considered when making the decision to assess taxes against Stuart as of the date of the auction, and therefore have no basis upon which to conclude the trial court erred.

EVIDENTIARY ISSUE

Stuart contends the trial court erred by admitting into evidence through the testimony of an accountant certain documents which Stuart contends constituted hearsay. A trial court is generally given considerable latitude in the admission of evidence and our review of evidentiary objections is based upon the abuse of discretion standard. *Steele v. Ft. Sanders Anesthesia Group, P.C.*, 897 S.W.2d 270, 275 (Tenn. Ct. App. 1994)(citing *Austin v. City of Memphis*, 684 S.W.2d 624, 631 (Tenn. Ct. App. 1984))(other citations omitted). We do not have the benefit of a transcript of the evidence and therefore have no basis upon which to conclude the trial court erred by considering the challenged evidence.

CONCLUSION

Finding no error with the decisions of the trial court, the judgment of the trial court is affirmed with costs of appeal assessed against Appellant, James Michael Stuart.

FRANK G. CLEMENT, JR., JUDGE